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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY DONAHUE BARRON,

Defendant and Appellant.

C064240

(Super. Ct. Nos.
09F07698, CR77767 &
CR90219)

On October 2, 1986, a detective bought \$25 of rock cocaine from appellant Troy Donahue Barron. In April 1987, appellant pled guilty to selling rock cocaine (Health & Saf. Code, § 11352) and was sentenced to four years in prison in case No. 77767. On March 23, 1989, an informant purchased rock cocaine from appellant. Appellant pled guilty to selling rock cocaine (Health & Saf. Code, § 11352) and was sentenced to four years in prison in case No. 90219. In 1999, the convictions were used to

enhance appellant's sentence in federal district court following convictions for conspiracy to distribute cocaine base (21 U.S.C. §§ 846, 841), five counts of distribution of cocaine base (21 U.S.C. § 841), and four counts of distribution of cocaine base near a school (21 U.S.C. § 860).

On September 18, 2009, appellant filed a petition for writ of error coram nobis in the trial court challenging his 1986 and 1989 convictions. In his writ petition, appellant alleged that he was factually innocent of the crimes, his pleas in the prior cases violated *Boykin v. Alabama* (1969) 395 U.S. 238 [23 L.Ed.2d 274], ineffective assistance of trial counsel, his criminal record should be sealed under the "Youthful Offender Act," and the prior convictions should be reduced to misdemeanors.

On November 9, 2009, the trial court construed appellant's coram nobis petition as a petition for writ of habeas corpus and, after analysis of each of his claims, denied the petition for failure to show he is entitled to any relief.

Appellant filed a motion for reconsideration on December 7, 2009. Appellant's motion noted he had filed a petition for writ of error coram nobis, and habeas corpus was improper because California did not have custody over him. The trial court construed this as a "petition for writ of habeas corpus/coram nobis," which it denied on January 4, 2010.

Appellant filed a notice of appeal on February 10, 2010.

Appellant's appeal is timely. A party has 60 days from receiving notice of entry of judgment from the trial court to file notice of appeal. (Cal. Rules of Court, rule 8.308(a).)

While appellant's notice of appeal would be untimely with respect to the November 9 order, his notice of appeal is timely from the trial court's second order, the January 4 denial of his coram nobis petition.

Ordinarily, a motion for reconsideration will not extend the time for filing a notice of appeal. However, appellant's motion for reconsideration was not dilatory. The motion reminded the trial court it had misconstrued appellant's initial petition and there were substantive differences between habeas corpus and coram nobis. We conclude that appellant can appeal from the trial court's order following the motion for reconsideration.

The denial of a petition for a writ of error coram nobis is appealable. (Pen. Code, § 1237, subd. (b); *People v. Shorts* (1948) 32 Cal.2d 502, 506-507.) We affirm unless the trial court abused its discretion in denying relief. (*People v. Painter* (1963) 214 Cal.App.2d 93, 99; *People v. Devora* (1951) 105 Cal.App.2d 457, 463.)

We appointed counsel to represent appellant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Appellant filed a supplemental brief asserting *Boykin* error, ineffective assistance of counsel, his innocence of the

offenses, and that his sentences should be reduced or expunged under the Youthful Offender Act.

A writ of coram nobis is granted only when the following three requirements are met: (1) the petitioner must show that without any fault or negligence on his part, some fact was not presented to the court at the trial on the merits, which would have prevented the rendition of the judgment; (2) the petitioner must show that the newly discovered evidence does not go to the merits of issues tried because issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial; and (3) the petitioner “must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . .” [Citations.]” (*People v. Shipman* (1965) 62 Cal.2d 226, 230.)

Appellant has not stated a valid ground for coram nobis relief. The writ of coram nobis will not issue to vacate a plea of guilty where the claim is that the defendant did not receive the effective assistance of counsel. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 982-983.) Claims of factual innocence go to the merits of his convictions, and cannot be raised on coram nobis. Reducing or expunging appellant’s prior sentences goes to the legality of his prior sentences, which cannot be raised on coram nobis. “The writ [of coram nobis] lies to correct only errors of fact as distinguished from errors of law. [Citation.]’ [Citation.]” (*People v. Ibanez* (1999)

76 Cal.App.4th 537, 545.) Even if *Boykin* error could be raised on coram nobis, appellant alleges no new facts in support of his claim which he or trial counsel could not have discovered much earlier.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to appellant.

DISPOSITION

The trial court's order denying appellant's petition for writ of error coram nobis is affirmed.

We concur: BLEASE, Acting P. J.

NICHOLSON, J.

MAURO, J.